SUMMARY of COOPERATIVE CASES

FARMER COOPERATIVE SERVICE
U. S. DEPARTMENT OF AGRICULTURE
WASHINGTON, D. C.

LEGAL SERIES NO. 2

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CORRECTION

This is to replace wrong Table of Contents inadvertently inserted in your Legal Series No. 2, Summary of Cooperative Cases, dated September, 1957. Farmer Cooperative Service, U. S. Department of Agriculture.

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The comments on cases reviewed herein represent the personal opinion of the author and not necessarily the official views of the Department of Agriculture.

FTC ENTERS FINAL ORDER IN FLORIDA CITRUS MUTUAL CASE

(In the Matter of Florida Citrus Mutual, FTC Docket No. 6074)

In Florida Citrus Mutual, Docket No. 6074, the Federal Trade Commission, on May 10, 1957, ruled that Florida Citrus Mutual, Lakeland, Florida, a nonprofit marketing association of 7,000 citrus fruit growers, may continue to use its supply adjustment program to relieve and prevent market gluts in citrus fruit. The ruling, however, forbade resumption of the association's pre-1952 attempts to control the price or interstate shipment of fruit after grower-members have sold it to handlers and processors.

Significantly, the Commission's 3-0 decision also approved the right of Mutual as a Capper-Volstead cooperative to contract with any purchaser concerning prices to be paid the grower-members for oranges, grapefruit, and tangerines, even though the association does not take title to or actually market the members' fruit. Mutual's method of operation in this respect, as set forth in the Commission's decision, was as follows:

> "Mutual requires each grower member to execute a uniform marketing contract agreeing, among other things, to market his entire production of citrus fruit exclusively through handlers who must execute a Handler's Contract with Mutual. Growers marketing their own citrus fruit also may execute a Handler Contract. Liquidated damages are provided for in the event citrus fruit is marketed through a handler other than one who has entered into a Handler's Contract with Mutual. The grower's contract is for ten years with the privilege of withdrawing in June of any year.
>
> "Mutual also contracts with handlers who are fresh fruit packers and shippers, canners and concentrators, and intermediate handlers. The latter are cash buyers who buy from growers and resell to the other two types of handlers. In this regard the hearing examiner found:
>
> > "'Respondent FCM enters into three types of contracts with handlers. The "A" handler contract is entered into for a period of one year between FCM and a handler who is "a buyer, processor or canner engaged in handling, buying, processing, canning, shipping and/or marketing of citrus fruit."
> >
> > * * * * *
> >
> > "'This type of contract is intended to be used by those handlers who are processors and who rarely buy their fruit directly from the growers, but deal through intermediate handlers who may or may not buy from FCM members.

> "'The "B" handler contract is entered into for a period of ten years between FCM and the handlers of fresh fruit who primarily ship it in interstate commerce. Under this contract the handler agrees to ship or pack only fruit of members of FCM except as may be permitted by the Board of Directors of FCM. This contract also provides that the handler in the "sale, shipping and distribution of all fresh fruits" marketed by him be governed "by the rules, regulations, orders and instructions" issued by FCM. The Board of Directors of FCM, since 1951, has authorized "B" Contract handlers to handle fruit of non-members under certain rules and regulations.
>
> "'The "C" contract is entered into between FCM and the intermediate handler * * * who is a handler of citrus fruit having no packing, shipping or processing facility, but who performs a harvesting service, sometimes on an agency basis and sometimes on a purchase-and-sale basis. This contract, by its terms, permits the handler to purchase from FCM members and requires him to collect FCM's assessments on the members' fruit handled by him and remit same to FCM.'"

The Commission, in effect, sustained the legality of these contracts insofar as they controlled the price between Mutual's grower-member and the first buyer of the fruit.

However, the opinion states:

> "The hearing examiner further found in effect that through the operation of these contracts, and by means of other practices, hereinafter explained in more detail, Mutual, acting for its grower members, was enabled to secure the cooperation of handlers in establishing and maintaining prices at which the latter resold citrus fruit and citrus fruit products, or prices which handlers paid therefor to other than Mutual's grower members.
>
> "The hearing examiner also found that in 1949, 1950, and 1951, and to some extent in 1952, respondent Mutual's activities in fixing and enforcing minimum or 'floor' prices on fresh fruit f.o.b. (prices received by handlers for fresh fruit shipped out of Florida), as well as 'delivered-in' prices (those paid by canners and processors to intermediate handlers), and the prices obtained by canners and processors when they in turn sold citrus products, restrained and suppressed competition between handlers and between processors and that, since such prices were those to be obtained by handlers and processors, as distinguished from prices obtained by Mutual's grower members, they were outside the immunity of the Capper-Volstead Act. He concluded that the price-fixing program came within the condemnation of the antitrust laws. He pointed out that in the 1949-1950

season the program had been quite successful (although it had broken down somewhat in 1952) and that it could again be resorted to in the future under similar conditions.

"Similarly, with regard to the so-called allotment program over the same period, he found that through both voluntary and compulsory allotments, Mutual had successfully controlled, prorated and restricted the quantity of fresh fruit shipped in interstate commerce by handler-shippers and thus unduly interfered with and suppressed competition between such handler-shippers."

It then reviews the evidence and concludes that the hearing examiner's findings in these respects were correct.

Florida Citrus Mutual had also challenged the jurisdiction of the Commission since Mutual did not actually handle or sell any fruit. This contention was overruled, the Commission pointing out that "associations used as instrumentalities to effectuate illegal restraints on competition clearly are amenable to the jurisdiction of the Commission." Two other arguments going to the question of jurisdiction were turned down as being without merit.

With respect to the program in 1952 and subsequent years the opinion states in part:

"The hearing examiner found that in 1952 Mutual began its price-guide information program, publishing daily and weekly market bulletins and that this program was continued during 1953 and 1954. He further concluded that:

> "'There is no evidence in the record indicating that the respondent FCM has attempted to compel or coerce the fresh-fruit shippers to follow the suggested curtailment of shipments, or otherwise to cooperate in its Supply Adjustment Program; nor is there any evidence that respondent FCM has required these shippers to report to it the extent to which they have followed the program. However, FCM obtains data as to shipments on an industry basis from the Growers Administration Committee, acting under the Federal Marketing Agreement, and publicity is given to the extent to which the program has been followed or observed by the shippers as a group.'

"The record indicates that respondents' price-guide information and supply adjustment program merely inform the trade as to economic and market conditions and recommend a course of conduct tending to relieve market gluts in citrus fruit. Such a program unaccompanied by concerted activity by respondents tending toward unlawful fixing, establishing or maintenance of prices or fostering or effectuating illegal restraints on competition in the citrus fruit industry, is not in contravention of any of the laws administered by the Federal

On the scope of the final cease and desist order on the matter of prices the Commission ruled:

> "The Commission is of the opinion that any order herein should prohibit the respondents from fixing, in addition to 'f.o.b.' prices, the so-called 'delivered-in' prices at which handlers resell fruit to processors. To that extent, the contention of counsel supporting the complaint is accepted. The Commission does not agree, as urged by counsel supporting the complaint, that the price-fixing inhibitions of the order should extend to 'any prices.' As we have found above, respondents, for example, operate within the immunity of the Capper-Volstead Act insofar as their pricing activities are limited to establishing, cooperatively, prices which should be paid to their grower members by handlers. The first prohibition of the order will be modified in accordance with the foregoing."

FTC AFFIRMS INITIAL DECISION AND ORDER AGAINST FLORIDA CITRUS EXCHANGE

(In the Matter of Florida Citrus Exchange, FTC Docket No. 6255)

The Initial Decision of Hearing Examiner Lipscomb in this case (reported in Summary No. 69, p. 9) was affirmed by the Commission on November 26, 1956. This initial decision found that in certain cases Florida Citrus Mutual had paid brokerage fees to several buyers of citrus fruit being marketed by the cooperative and that such buyers with respect to the transactions in question were buying on their own account. Section 2(c) of the Clayton Act as amended by the Robinson-Patman Act specifically precludes such transactions.

The Commission's opinion states, in part:

> "The hearing examiner in effect held that the five parties to whom respondent paid brokerage fees were in fact buying on their own account for the purpose of resale in their own way with the hope of making a profit.
>
> "This finding is supported by proof of what the parties did in individual transactions. Produce was invoiced to the alleged brokers and sight drafts sometimes drawn on them for payment. The fruit was treated by these consignees as their own property, sometimes stored in their own warehouses, insured at their own expense, included in their inventories for tax purposes, and sold to persons whose names were unknown to respondent, under conditions of sale also unknown. These consignees made sales at varying prices and treated resulting profits and losses as their own.

"The facts are similar to those in Southgate Brokerage Company, Inc. v. FTC (1945), 150 F. 2(d) 607, in which the court upheld an order of the Commission issued under Section 2(c) of the amended Clayton Act.

"Respondent argues that it did not know what the alleged 'broker' did with the produce after he received it and particularly did not know that the broker was 'upcharging' the person to whom he made delivery. No claim is made here that legally paid brokerage fees were secretly passed on by the broker to the buyer. The complaint is to the effect that the persons to whom the brokerage fees were paid were actually buying on their own account. Respondent certainly did know the facts of its own transactions with its own consignees. The fact that its knowledge and interest did not go beyond that is strong proof that the transaction was a sale and not a brokerage deal."

The specific type of transactions involved were so-called pool-car or drug store sales of citrus. These transactions were described in the Initial Decision as follows:

". . . . a pool-car sale of citrus fruit is simply a transaction wherein two or more relatively small buyers in a given market collectively buy from Respondent through Respondent's broker the contents of a car or truck of citrus fruit and take their agreed pro rata share thereof. Having effected such a pool-car sale, Respondent's broker notifies Respondent as to the various and varying grades, sizes, varieties and containers required in the car or truck to meet the various and varying needs and demands of the multiple buyers involved. When the order is filled by Respondent, the car is shipped to the broker, who, as Respondent's agent, attends to distribution of the contents among the buyers involved, and remits to Respondent the sales price for the fruit, less the customary brokerage; or, in the alternative, remits to Respondent the entire sales price for the fruit, and Respondent pays such broker the customary brokerage due him."

DENVER STOCKYARDS CASE TO SUPREME COURT

The Supreme Court on June 3, 1957, granted the Department of Agriculture's petition for certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in the case of Producers Livestock Marketing Association v. United States, et al., 241 F. 2d 192, involving issues under the Packers and Stockyards Act. (See Summary L.S. No. 1.)

PATRONAGE REFUNDS AGAIN HELD NOT TAXABLE CURRENTLY

(Bernard B. Carter, Doc. No. 52795, T.C. Memo 1957-65, CCH Dec. 22, 345(M))

In a memorandum opinion Judge Black of the Tax Court held that certain "patronage dividend certificates" received by a cash basis taxpayer, and which were found to have no fair market value, were not currently taxable to the taxpayer. He relied on Commissioner of Internal Revenue v. Carpenter, 219 F. 2d 635 (5 Cir., 1955).

REVOCATION OF TAX EXEMPTION; RETROACTIVE APPLICATION; WHEN STATUTE OF LIMITATIONS BEGINS TO RUN

(Automobile Club of Michigan v. C.I.R., 77 S. Ct. 707)

This case establishes principles which undoubtedly would have application in situations where an "exempt" farmer cooperative might have its exemption revoked.

The Supreme Court held, on the facts here involved, that:

1. The Commissioner did not abuse his discretion when, in revoking a prior exemption ruling, he made the revocation retroactively effective for two tax years preceding the tax year in which the revocation occurred.

2. Where Treasury regulations did not provide an income tax exemption for taxpayer, but merely specified necessary information required to be filed in order that the Commissioner of Internal Revenue might rule on status, repeated reenactments of basic statute (a) did not give force of law to that part of the regulation providing that an organization which had established right to exemption need not thereafter make a return of income unless it changed its character or purpose and (b) did not preclude the Commissioner from exercising his statutory power of retroactive revocation of the exemption ruling.

3. The statute of limitations on deficiency assessment of income taxes would not be deemed to begin to run from dates when, if there were a duty to file, the statute required filing on theory that taxpayer's failure to file on such dates was induced by Commissioner's rulings. The statute expressly provides that it is to run against the United States from date of actual filing, and no action of the Commissioner could change or modify this condition.

4. Filing mere information returns (Form 990 returns) does not constitute filing of returns for purpose of three-year statute of limitations on deficiency assessment of income tax.

5. The Commissioner acted within his discretion under section 41 of the Internal Revenue Code of 1939 when he determined, in reliance on the claim of right doctrine, that taxpayer's method of accounting for prepaid membership fees did not clearly reflect its income.

Briefly, the facts were that in 1945 the Commissioner revoked his 1934 and 1938 rulings exempting the Automobile Club from Federal income taxes, and retroactively applied the revocation to 1943 and 1944. The Commissioner also determined that prepaid membership fees received by the Club should be taken into income in the years received, rejecting the Club's method of reporting as income only that part of the dues as was recorded on petitioner's books as earned in the tax year. The Tax Court sustained the Commissioner and the Court of Appeals affirmed. The Supreme Court granted certiorari.

Excerpts from the opinion relative to points 1-4, inclusive, set forth above, are quoted (exclusive of the marginal notes) below:

"The Commissioner's earlier rulings were grounded upon an erroneous interpretation of the term 'club' in Sec. 101(9) and thus were based upon a mistake of law. It is conceded that in 1943 and 1944 petitioner was not, in fact or in law, a 'club' entitled to exemption within the meaning of Sec. 101(9), and also that petitioner is subject to taxation for 1945 and subsequent years. It is nevertheless contended that the Commissioner had no power to apply the revocation retroactively to 1943 and 1944, and that, in any event, the assessment of taxes against petitioner for 1943 and 1944 was barred by the statute of limitations.

"The petitioner argues that, in light of the 1934 and 1938 rulings, the Commissioner was equitably estopped from applying the revocation retroactively. This argument is without merit. The doctrine of equitable estoppel is not a bar to the correction by the Commissioner of a mistake of law. The decision in Stockstrom v. Commissioner, 88 U.S. App. D.C. 286, 190 F. 2d 283, 30 A.L.R. 2d 443, to the extent that it holds to the contrary, is disapproved.

* * * * * *

"The Commissioner's action may not be disturbed unless, in the circumstances of this case, the Commissioner abused the discretion vested in him by Sec. 3791(b) of the 1939 Code. . . .

* * * * * *

"The petitioner contends that this section forbids the Commissioner taking retroactive action. On the contrary, it is clear from the language of the section and its legislative history that Congress thereby confirmed the authority of the Commissioner to correct any ruling, regulation or Treasury decision retroactively, but empowered him, in his discretion, to limit retroactive application to the extent necessary to avoid inequitable results.

* * * * * *

"We must, then, determine whether the retroactive action of the Commissioner was an abuse of discretion in the circumstances of this case. The action was the consequence of the reconsideration by the Commissioner, in 1943, of the correctness of the prior rulings exempting automobile clubs, initiated by a General Counsel Memorandum interpreting Sec. 101(9) to be inapplicable to such organizations. The Commissioner adopted the General Counsel's interpretation and proceeded to apply it, effective from 1943, indiscriminately to automobile clubs. We thus find no basis for disagreeing with the conclusion, reached by both the Tax Court and the Court of Appeals, that the Commissioner, having dealt with petitioner upon the same basis as other automobile clubs, did not abuse his discretion. Nor did the two-year delay in proceeding with the petitioner's case, in these circumstances, vitiate the Commissioner's action.

"The petitioner's contention that the statute of limitations barred the assessment of deficiencies for 1943 and 1944 is also without merit. Its returns for those years were not filed until October 22, 1945. Within three years, on August 25, 1948, the petitioner and the Commissioner signed consents extending the period to June 30, 1949. The period was later extended to June 20, 1950. Notice of deficiencies was mailed to petitioner on February 20, 1950. The assessments were therefore within time under Sections 275(a) and 276(b) unless, as the petitioner asserts, the statute of limitations began to run from the dates when, if there was a duty to file, the statute required filing. The petitioner argues that because its omission to file on March 15, 1944, and March 15, 1945, was induced by the Commissioner's 1934 and 1938 rulings, it is only equitable to interpret the statute of limitations as running from those dates in the circumstances of this case. But the express condition prescribed by the Congress was that the statute was to run against the United States from the date of the actual filing of the return, and no action of the Commissioner can change

or modify the conditions under which the United States consents to the running of the statute of limitations against it. In Lucas v. Pilliod Lumber Co., 281 U.S. 245, 249, 50 S. Ct. 297, 299, 74 L. Ed. 829, this Court held:

> "'Under the established general rule a statute of limitations runs against the United States only when they assent and upon the conditions prescribed. Here assent that the statute might begin to run was conditioned upon the presentation of a return duly sworn to. No officer had power to substitute something else for the thing specified. * * *'

"It is also argued that the Form 990 returns filed by the petitioner in compliance with Sec. 54(f) of the 1939 Code, as amended, constituted the filing of returns for the purposes of Sec. 275(a). But the Form 990 returns are merely information returns in furtherance of a congressional program to secure information useful in a determination whether legislation should be enacted to subject to taxation certain tax-exempt corporations competing with taxable corporations. Those returns lack the data necessary for the computation and assessment of deficiencies and are not therefore tax returns within the contemplation of Sec. 275(a). Cf. Commissioner of Internal Revenue v. Lane-Wells Co., 321 U.S. 219, 64 S. Ct. 511, 88 L. Ed. 684."

SALES; WARRANTY; FRAUD; ACCORD AND SATISFACTION

(Neff v. Western Cooperative Hatcheries, 241 F. 2d 357, U.S.C.A. 10th, 1957)

In this case the cooperative brought suit to recover money due under a contract of sale of turkey poults. Buyer counterclaimed for damages accruing because of alleged misrepresentation. The lower court entered judgment in favor of the cooperative and the buyers appealed. The decision was affirmed by the Circuit Court.

The case involved three issues:

"1. Did the seller expressly or impliedly warrant the turkeys, and if so, did it breach such warranty to the buyer's damage?

"2. Did the seller fraudulently supply diseased turkeys to the buyer's damage?

"3. Was there an accord and satisfaction that discharged liability, if any?"

On the first issue it was held that where the sales contract expressly denied any express or implied warranty, as it did in this case, and stated that seller was using its best efforts to produce good chicks and poults, such statement was not a warranty as to the health of the poults. It followed that on the second issue there could be no misrepresentation which could form the basis of actionable fraud.

On the third point, the facts failed to establish an accord and satisfaction on any part of the contract price. Accordingly, judgment was awarded for the full contract price plus interest, and this result was affirmed by the Circuit Court.

AGREEMENT TO PLACE POULTS; LIABILITY THEREUNDER

(Nephi Processing Plant v. Western Cooperative Hatcheries, 242 F. 2d 567)

This was a suit by the hatchery to recover on a promissory note (a) for turkey poults delivered to the processor pursuant to a written agreement to place such poults with growers and (b) for poults delivered to processor but not covered by placement agreement, wherein processor filed counterclaim. The lower court entered judgment on directed verdicts in favor of the cooperative and the processor appealed.

The placement agreement provided that the processor would place poults with growers and assist hatchery in collection of purchase price, one-half of which was to be paid by growers within 30 days and the balance evidenced by notes and mortgages. The Circuit Court held that whether this agreement was an original undertaking by the processor in furtherance of his own interests or a collateral agreement underwriting debt of growers to hatchery with Utah statute of frauds, and hence not subject to oral modification was a question of fact for the jury under the evidence. Accordingly, the judgment was reversed and the cause remanded.

MASTER AND SERVANT; LIABILITY OF CORPORATE EMPLOYER FOR ACTS OF EMPLOYEE

(Farr v. Cambridge Co-operative Oil Co., 81 N.W. 2d 597 (Neb.))

This was an action to recover from the cooperative for injuries sustained by plaintiff when he, as a patron of a gasoline station, was hurt as a result of a firecracker explosion. The firecracker was dropped by station employees as a joke on patron when he was in the rest room. A lower court judgment for plaintiff was reversed on appeal, the court holding that the evidence established that the employees acted outside the scope of their employment. It applied the well established rule that a master is not liable for torts of his servant, unless connected with the servant's duties.